STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission on its own motion	)	
	)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs prudently incurred	)	
Illinois Commerce Commission on its own motion	)	
	)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Proceeding to review Rider 4, Gas Cost, pursuant to Section 9-244(c) of the Public Utilities Act	)	
Illinois Commerce Commission on its own motion	)	
	)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs prudently incurred	)	

VERIFIED REPLY OF NICOR GAS COMPANY
IN SUPPORT OF MOTION TO COMPEL DISCOVERY
FROM CITIZENS UTILITY BOARD
AND THE COOK COUNTY STATE'S ATTORNEY'S OFFICE

Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor Gas" or the "Company"), through its undersigned attorneys, hereby respectfully submits its Verified Reply in support of its Motion to Compel Citizens Utility Board ("CUB") and the Cook County State's Attorney's Office ("Cook County") (collectively, "CUB/Cook County") to produce relevant documents authored or reviewed by their testifying witness, Jerome D. Mierzwa, which these parties have withheld from production stating that the documents are privileged.

I.
Introduction

CUB/Cook County are withholding from production four (4) reports written by their testifying witness, Mr. Mierzwa, which relate directly to the issues presented in this proceeding. (*See* Mot., Ex. 1). Additionally, they are withholding various unidentified materials relating to the October 28, 2002 Report to the Special Committee of the Board of Directors of Nicor, Inc. by independent counsel Scott R. Lassar (the "Lassar Report"), including those apparently created or reviewed by Mr. Mierzwa in connection with his role as a testifying witness. (*See* Mot., Exs. 2). In their Response, CUB/Cook County for the first time also identify approximately eighty-five (85) email communications between Mr. Mierzwa, and CUB and its counsel, relating to the subject matter of this proceeding.

The Company has sought disclosure of these materials in discovery, which are indisputably relevant to this proceeding. Illinois law requires full disclosure of all relevant materials to a case, including materials created and reviewed by a party's testifying expert. (*See* Argument *infra*). The law is unequivocal in this respect—including as applied in Commission proceedings. While the attorney-client privilege and the attorney work product doctrine are recognized exceptions to the rule of full disclosure, each exception is limited in scope and narrowly construed in favor of the policy of liberal and open discovery.

CUB/Cook County have asserted both the attorney-client and the work product doctrine in withholding Mr. Mierzwa's documents.[1] In their Response, CUB/Cook County offer no factual or legal support that either protection from disclosure should attach to the documents in

[1] Nicor Gas notes that Cook County, in the first instance, did not object to the disclosure of Mr. Mierzwa's relevant documents on the basis of the attorney-client privilege but only on the work product doctrine. (*See* Mot., Ex. 2). Because counsel for Cook County signed the Response filed by these parties, which includes argument in support of both theories, the Company assumes for purposes of its Reply that Cook County has adopted CUB's objection based on the attorney-client privilege. (*See* Mot., Ex. 1).

question. Their assertion that Mr. Mierzwa was a member of the control group for both organizations for purposes of the attorney-client privilege is not facially credible. On the question of the work product doctrine, CUB/Cook County provide no support whatsoever for the essential proposition that Mr. Mierzwa's documents even contain these parties' attorneys' mental impressions, theories, or litigation plans. Absent a demonstration that some privilege applies, the withheld materials should be produced without further delay or, at a minimum, with respect to the newly identified communications, described with sufficient particularity to allow for a determination as to whether a valid privilege might exist.

Finally, absent any factual or legal support for their claims of privilege, CUB/Cook County ask the Administrative Law Judges (the "ALJs") to carve out a new exception to Illinois' discovery law under which intervening parties in Commission proceedings would be allowed to withhold from production relevant documents created or reviewed by their testifying witnesses. This request is inconsistent with the positions previously staked out by CUB/Cook County in this proceeding related to liberal and open discovery and, in effect, asks the ALJs to enforce a double-standard on such matters. The ALJs should not accept this invitation.

In sum, for the reasons set forth below and in its Motion, the Company respectfully requests that the ALJs grant the Motion in its entirety.

II.
Argument

A. Illinois Law Clearly Requires Full Disclosure Of Relevant Matters Including Materials Created Or Reviewed By A Party's Testifying Witness

In their Response, CUB/Cook County assert as their primary argument that the law is "vague" or "silent" on the requirement for a party to disclose all relevant materials in discovery, including those created or reviewed by a testifying witness.

To the contrary, Illinois law expressly requires disclosure of all material relevant to an action. Ill. Sup. Ct. Rule 201(b)(1); 83 Ill. Admin. Code § 200.340. For this purpose, the concept of relevance is broad and determined by reference to the issues presented. *See Bauter v. Reding*, 68 Ill. App. 3d 171, 175, 385 N.E.2d 886, 890 (3d Dist. 1979); *accord Pemberton v. Tieman*, 117 Ill. App. 3d 502, 505, 453 N.E.2d 802, 804 (1st Dist. 1983).

Critically, an assertion of privilege is an *exception* to the otherwise applicable requirement of full disclosure. *See Consolidation Coal Co. v. Bucyrus-Erie Co*., 89 Ill. 2d 103, 117-18, 432 N.E.2d 250, 256-57 (1982) (citations omitted). A party which claims to be exempt from discovery on the basis of privilege has the burden of demonstrating the facts giving rise to the claim. *Krupp v. Chicago Transit Auth.*, 8 Ill. 2d 37, 42, 132 N.E.2d 532, 536 (1956).

Thus, the question presented is whether CUB/Cook County have met their burden of supporting the privileges that they have asserted in refusing to comply with the discovery which is subject to the Company's Motion. As shown below, they have not.

B. Mr. Mierzwa Is Not A Member Of The Control Group Of CUB Or Cook County For Purposes Of The Attorney-Client Privilege

As formulated by the Illinois Supreme Court, the attorney-client privilege functions as a bar to disclosure of qualifying "communications between a party or his agent and the attorney for the party." *See* Ill. Sup. Ct. R. 201(b)(2). The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and its legal counsel. *Consolidation Coal Co.*, 89 Ill. 2d at 117-18, 432 N.E.2d at 256-57.

Mr. Mierzwa is not an attorney nor is he counsel to CUB or Cook County. Thus, the essential predicate of the privilege does not exist and the attorney-client privilege does not apply to the materials in question.[2]

To avoid this result, CUB/Cook County in their Response baldly assert that Mr. Mierzwa's documents and communications nonetheless are protected from disclosure, because Mr. Mierzwa was a member of the "control group" for both organizations. (Resp., p. 8). In effect, because Mr. Mierzwa is not their attorney, CUB/Cook County assert that he is the client. This novel proposition finds no support under clearly established Illinois law.

In *Consolidation Coal Co*., the Illinois Supreme Court considered the question of who speaks for an organization on a privileged basis and adopted a "control group" test intended to protect consultations between counsel, and top management and their advisory staff, while minimizing the amount of material immune from discovery. 89 Ill. 2d at 118-19; 432 N.E.2d at 257. Specifically, the Court identified and limited those persons for whom a corporation properly may claim the attorney-client privilege to the following:

> [A]s a practical matter, the only communications that are ordinarily held privileged … are those made by top management who have the ability to make a final decision, rather than those made by employees whose positions are merely advisory. We believe that an *employee* whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group.

[2] It bears repeating that, even if Mr. Mierzwa were an attorney and represented these parties in this matter, any privilege would have been waived entirely based upon CUB/Cook County's identification of Mr. Mierzwa as a testifying witness in this proceeding. *People v. Wagener*, 196 Ill. 2d 269, 273-78, 752 N.E.2d 430, 434-37 (2001) (attorney-client privilege waived as to matters disclosed to testifying expert). CUB/Cook County previously relied upon *Wagener* for precisely this proposition and should not be allowed to take a contrary position now for their advantage or convenience. (*See* Mot., Ex. 3).

Consolidation Coal Co., 89 Ill. 2d at 120; 432 N.E.2d at 257-58 (*emphasis provided*) (citations omitted).

Mr. Mierzwa is not an employee of either CUB or Cook County. He is, at least in theory, independent of these organizations. Consequently, he is not a member of the control group of either organization, and the attorney-client privilege is unavailable to shield his relevant documents and communications from production.

C. As A Testifying Witness, Mr. Mierzwa's Relevant Documents Are Not Subject To The Limited Protections Of The Attorney Work Product Doctrine

Illinois law provides that "[m]aterial prepared by or for a party in preparation for trial is subject to discovery *only* if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. Sup. Ct. R. 201(b)(2) (*emphasis provided*). Thus, as codified and restated by the Illinois Supreme Court, the general rule requiring full disclosure of relevant matters applies to materials prepared in anticipation of litigation, but only so long as these materials do not contain attorney opinion work product. *See Consolidation Coal Co.*, 89 Ill. 2d at 108-11, 452 N.E.2d at 252-53.

Illinois also recognizes a qualified protection against disclosure for the opinions and work product of consultants—*i.e.*, persons who have been retained or specially employed in anticipation of trial but who will not be called at trial. *See* Ill. Sup. Ct. R. 201(b)(3). Mr. Mierzwa is not and was not at any time a "consultant" to CUB/Cook County within the meaning of Ill. Sup. Ct. R. 201(b)(3). *See, e.g., Nieukirk v. Bd. of Fire & Police Comm'rs*, 98 Ill. App. 3d 109, 113-14, 423 N.E.2d 1259, 1263-64 (3d Dist. 1981) (protections from discovery afforded to consultants' work product did not apply absent showing expected witness was intended to be non-testifying expert). CUB/Cook County concede this point.

The issue, then, is whether Mr. Mierzwa's relevant documents, which have been withheld from production, contain CUB's and Cook County's attorneys' opinion work product and, if so, whether these parties can employ the work product doctrine as a shield against disclosure of these materials.

1. Mr. Mierzwa's Work Product Is Not Attorney Work Product And Is Not Protected From Disclosure Under Illinois Law

Again, Mr. Mierzwa is not an attorney. Therefore, documents Mr. Mierzwa has prepared in connection with this proceeding, including the four (4) reports referenced in the Motion (*see* Mot., Ex. 1), are not subject to the protections of the work product doctrine—or, for that matter, those afforded non-testifying experts. *See* Ill. Sup. Ct. R. 201(b)(2-3).

In their Response, with respect to the reports prepared by Mr. Mierzwa, CUB/Cook County assert that:

> *The documents in question came from Mr. Mierzwa. Thus, it is impossible that the documents caused an improper influence on Mr. Mierzwa's testimony*.

(Resp., pp. 5-6) (*original emphasis*). CUB/Cook County miss the point entirely. In the event Mr. Mierzwa's reports, in fact, were created by Mr. Mierzwa alone and do not reflect the theories, mental impressions, or strategies of these parties' counsel, then the attorney work product doctrine simply does not apply. *See* Ill. Sup. Ct. R. 201(b)(2).

CUB/Cook County's Response fully supports this conclusion. In their filing, CUB/Cook County do not assert that Mr. Mierzwa's reports contain their attorneys' opinion work product. Rather, they merely assert that one of their attorneys requested that Mr. Mierzwa prepare these materials. (*See* Aff. of Robert J. Kelter, ¶ 7). Under these circumstances, as a matter of law, the documents should be disclosed.

2. Even Assuming Mr. Mierzwa's Documents Contain Attorney Work Product Such Materials Must Be Disclosed

CUB/Cook County do not present any support for the proposition that Mr. Mierzwa's reports contain attorney work product. Rather, they characterize these reports as Mr. Mierzwa's creations. (*See* Kelter Aff., ¶7). To the extent this characterization is accurate and complete, there is no question that the documents must be produced.

It is possible, however, that this characterization is not entirely accurate or complete. Thus, solely for purposes of argument, the Company assumes that Mr. Mierzwa's reports contain attorney work product—presumably because CUB and/or Cook County counsel communicated to Mr. Mierzwa their theories, mental impressions, or litigation plans which, in turn, made their way into his reports. Even under this assumed scenario, neither Mr. Mierzwa's reports nor the subject communications are protected from disclosure under the law.

As demonstrated in the Motion, this scenario has been considered extensively by the courts, and the weight of authority leaves no question that CUB/Cook County cannot bend the attorney work product doctrine to this purpose. It is critical that an adverse party have access to all information that shaped or potentially influenced a testifying witness's opinions, so that party can prepare full and effective cross-examination. *See Barna v. United States*, No. 95 C 6552, 1997 WL 417847 (N.D. Ill. July 23, 1997); *Karn v. Ingersoll-Rand Co*., 168 F.R.D. 633 (N.D. Ind. 1996); *Intermedics, Inc. v. Ventritex, Inc*., 139 F.R.D 384 (N.D. Cal. 1991).

In their Response, CUB/Cook County offer no facts or pertinent authority for their refusal to produce these materials—again, assuming *arguendo* that these documents actually contain attorney work product. Nicor Gas again notes that CUB/Cook County previously relied upon *Karn*, 168 F.R.D. 633, the same authority cited in the Motion, in support of their challenge to the assertion of the work product doctrine on behalf of Mr. Lassar on the basis that the Mr. Lassar

was a testifying witness for the Company. (*See* Mot., Ex. 3). These parties should not be allowed to disavow this authority at this juncture with respect to their own witness.

CUB/Cook County also seek to distance themselves from their prior reliance upon *Karn* on the basis, newly offered in their Response, that the Company's discovery directed at Mr. Mierzwa is "overly broad" in comparison to the discovery directed at Mr. Lassar. In reply, Nicor Gas directs the ALJs' attention to Cook County's Second Set of Data Requests to the Company, which states as follows:

> Please provide all workpapers, reports, notes, memoranda, correspondence, computations and/or calculations that were used by any Nicor witness who submitted and/or submits testimony in this proceeding.

Nicor Gas has responded fully to this discovery, which certainly is broad.[3] CUB/Cook County should be required to cooperate on an equal basis.

3. CUB/Cook County May Not Withhold Selected Relevant Materials On The Basis That Mr. Mierzwa Has Not Relied Upon Them

Finally, even if the documents created or reviewed by Mr. Mierzwa are not privileged, CUB/Cook County assert that they may limit production of these otherwise relevant materials on the basis that Mr. Mierzwa is not relying upon such matters for the testimony he is offering and, therefore, the selective disclosure of such matters poses no risk to the goals of the discovery process.

Applicable authority counsels strongly against such a proposition. In the only reported Illinois opinion to address directly disclosure of non-privileged materials created by a testifying expert, the Illinois Appellate Court found that the results of a polygraph test conducted by the

[3] For the ALJs' convenience, Nicor Gas has attached its response to Cook County's Second Set of Data Requests to this Reply as Exhibit 1.

expert should have been disclosed, even where the expert ultimately did not testify. *Nieukirk*, 98 Ill. App. 3d at 113-14, 423 N.E.2d at 1262-63. Since *Nieukirk*, the Court has adopted specific rules relating to expert witnesses.[4] *See* former Ill. Sup. Ct. R. 220 & current Ill. Sup. Ct. R. 213. Notably, the Court has adopted an express requirement rejecting selective disclosure of a testifying expert's reports. *See* Ill. Sup. Ct. R. 213(f)(3)(iii) (requiring production of *"any* reports prepared by the witness about the case") (*emphasis provided*).

Furthermore, documents created or even merely consulted by testifying witnesses are almost always discoverable in the Federal system.[5] The Federal courts have declined to allow the selective disclosure of testifying witnesses' documents, because full disclosure is essential to ensure effective cross-examination and to prevent an expert from adopting a "sanitized" presentation at trial purged of unfavorable facts or opinions to which the witness has been exposed.[6] *See, e.g., In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1442, 1444 (D. Colo. 1988) ("[A]n expert 'relies' upon material he finds unpersuasive as well as material supporting his ultimate position").

This result applies to Mr. Mierzwa's reports, which provide an obvious source of impeachment materials. To the extent they were disclosed to Mr. Mierzwa, CUB Policy Director David Kolata's various summaries and analysis of the Lassar Report also should be disclosed.

---

[4] The ALJs may find guidance in the Supreme Court Rules for purposes of their rulings on procedural matters, including those related to the conduct of discovery.

[5] CUB/Cook County's assertion that Fed. R. Civ. P. 26 and the cases addressed thereunder are not persuasive authority is contrary to the Illinois Supreme and Appellate Courts' frequent resort to the Federal rules and case law in discovery-related matters. *See Tzystuck v. Chicago Transit Auth*., 124 Ill. 2d 226, 235-38, 529 N.E.2d 525, 529-30 (1988); *Nieukirk*, 98 Ill. App. 3d at 113; 423 N.E.2d at 1262. It also is contrary to these parties' prior reliance on such authority for their own purposes. (*See* Mot., Ex. 3).

[6] In their Response, CUB/Cook County seek to counter the weight of authority through a single citation to an unreported case, *Trimec, Inc. v. Zale Corp*., No. 86 C 3885, 1992 WL 245602 (N.D. Ill. Sept. 23, 1992), which is easily distinguishable on the facts. The discovery in question in *Trimec* dealt with drafts of interrogatory responses prepared by counsel for an expert witness, which the witness testified did not affect his answers to such discovery. 1992 WL 245602, at * 3. Mr. Mierzwa's reports and communications sought by the Company in this proceeding are in no way analogous to the draft discovery responses at issue in *Trimec*.

(*See* Mot., Ex. 2). This result applies equally to Mr. Mierzwa's various unspecified relevant communications with CUB employees and its counsel, which have been withheld from production. (*See* Resp., p. 9).

Finally, the Company notes that CUB/Cook County assert in their Response that disclosure of Mr. Mierzwa's documents "would not be harmful to CUB." (Resp., p. 4). This position is inconsistent with CUB counsel's prior representations to Nicor Gas counsel that disclosure of Mr. Mierzwa's documents would be harmful, because Mr. Mierzwa's advice on litigation strategy to these parties is reflected in these materials. In the event no harm is threatened, full disclosure of the relevant materials should not be an issue.

D. The ALJs Should Not Accept CUB/Cook County's Invitation To Carve Out A New Exception To The Law Of Discovery Available Exclusively To Intervening Parties In Commission Proceedings

The courts have observed that "it would be foolish for the retaining party to use a testifying expert [to advise on strategy], as the communications would be an open book available for the opponent to review." *Chamberlain Group, Inc. v. Interlogix, Inc.*, No. 01 C 6157, 2002 WL 653893, at *4 (N.D. Ill. Apr. 19, 2002) (*quoting Commonwealth Ins. Co v. Stone Container Corp.*, 178 F. Supp. 2d 938, 945 (N.D. Ill. 2001). This requirement for full disclosure is not arbitrary. Experts, for better or worse, often are perceived as offering whatever testimony would serve the interests of the retaining party—regardless of the truth. Thus, the integrity of the truth-seeking process requires that an opposing party have a complete opportunity to review and analyze an expert's documents and, as appropriate, to make use of them against the witness.

In their Response, CUB/Cook County ask the ALJs to establish an exception to this requirement for the full disclosure of a testifying witness's relevant documents, which would apply only to intervenors in Commission proceedings. (*See* Resp., pp. 10-11). Under this

proposed exception, while the Company would remain subject to the requirements of liberal and open discovery under the law, including the Commission's rules, CUB/Cook County would not. In this proceeding, through Mr. Mierzwa's testimony, CUB/Cook County are seeking approximately $143 million in refunds to ratepayers from the Company. On balance, given the stakes, Nicor Gas submits that the protections afforded the fact-finding process through the enforcement of ordinary reciprocal discovery outweigh any inconvenience to CUB/Cook County to comply with the same.

III.
Conclusion

For all these reasons, Nicor Gas respectfully requests a ruling requiring CUB and Cook County to produce immediately the four (4) identified reports prepared by their testifying witness, Mr. Mierzwa, and any other relevant documents written or reviewed by him. To the extent CUB and Cook County reasonably believe that any previously unspecified documents—including the newly disclosed eighty-five (85) email communications between Mr. Mierzwa, and CUB and its counsel, are subject to a lawful privilege—Nicor Gas requests a ruling that these parties provide a privilege log for such materials without delay.

Finally, Nicor Gas notes that the issues presented are limited and fully briefed. Given the pressing deadline for submission of its rebuttal testimony on January 16, 2003, Nicor Gas is not requesting a hearing on this Motion. Nicor Gas further notes that shortly before the filing of this Reply, Staff of the Commission filed an untimely and unsupported "Response" to the Motion requesting that the ALJs extend the previously established briefing schedule and schedule a hearing at some later date. Staff's filing is its second in recent days which does not comport with prior rulings by the ALJs concerning scheduling in this matter. On the merits, Staff offers no support for its contention that the relief requested in the Motion in any way has "broad

implications for existing and future practice before the Commission." As shown above, the scope of the attorney-client privilege and the work product doctrine is subject to well-established authority, which is applicable to Commission proceedings. CUB/Cook County's invocation of these protections, without any ability to support the privileges claimed, is nothing more than uncooperative discovery, which is neither novel nor new. Under these circumstances, Nicor Gas submits that the ALJs in their discretion properly may rule upon the Motion without hearing based on the briefs filed.

Dated: January 12, 2003

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
D/B/A NICOR GAS COMPANY

By: _____
One of its attorneys

John E. Rooney
Thomas A. Andreoli
Sonnenschein Nath & Rosenthal LLP
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-8000
jrooney@sonnenschein.com
tandreoli@sonnenschein.com

VERIFICATION

I, Thomas A. Andreoli, being first duly sworn, depose and state that I am an attorney at Sonnenschein Nath & Rosenthal LLP and one of the attorneys for Northern Illinois Gas Company d/b/a Nicor Gas Company in Consol. Docket Nos. 01-0705, 02-0067, 02-0725, that I have read Nicor Gas's Verified Reply in Support of Motion to Compel Discovery from Citizens Utility Board and the Cook County State's Attorney's Office and know the contents thereof, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

Thomas A. Andreoli

Subscribed and sworn to before me
this 12th day of January 2004

Patricia A. Backlund
Notary Public

"OFFICIAL SEAL"
PATRICIA A. BACKLUND
Notary Public, State of Illinois
My Commission Expires 11/16/05

CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, hereby certify that I served a copy of Northern Illinois Gas Company d/b/a Nicor Gas Company's Verified Reply in Support of Motion to Compel Discovery from Citizens Utility Board and the Cook County State's Attorney's Office upon the service list in consolidated Docket Nos. 01-0705/02-0067/02-0725 by email on January 12, 2004.

Thomas A. Andreoli